Supreme Court, U.S.
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No. 01-167

In The

Supreme Court of the United States

GLENN K. JACKSON and ELSIE JACKSON,

Petitioners,

v.

WEST TELEMARKETING CORPORATION, WEST TELEMARKETING CORPORATION OUTBOUND, STEVEN GARZA and PROVIDENCE COMMERCIAL REAL ESTATE SERVICES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The primary question presented is one of waiver. Petitioners have raised choice of law challenges in this Court that were not raised in the district court and do not warrant consideration now.

In addition, this case addresses settled questions of federal civil procedure; specifically, the Fifth Circuit's decision turns on the application of time-worn choice of law standards following the transfer of venue under either 28 U.S.C. § 1404(a) or § 1406 pursuant to a forum selection clause. Because of the unusual procedural posture below, however, and because of Petitioners' failure to raise this issue until appeal to the Fifth Circuit, no court has ever decided whether venue was proper where the case was originally filed. Nor has any court addressed whether retaining the transferor court as the forum would be independently improper as to the later-added defendants, where it is undisputed the transferor court would not have had personal jurisdiction over them. The Fifth Circuit opinion recognizes and correctly recites the applicable general law regarding § 1404(a) versus § 1406 transfers, then resolves the case correctly in light of the case-specific, unique record before it. That case-specific holding does not conflict with any decision of this Court or any other Circuit.

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BRIEF IN OPPOSITION

Respondents respectfully urge this Court to deny the petition for a writ of certiorari, which seeks review of a judgment of the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

This action arises out of the sale of two office buildings in San Antonio, Texas, known as Woodway Park Phases I and IV. On June 5, 1993, Petitioners Glenn and Elsie Jackson ("Jackson") learned that the Resolution Trust Corporation (the "RTC") was offering the Phase IV property for sale at a list price of $2.3 million. The RTC, as receiver for Old Stone Federal Savings Bank ("Old Stone"), owned about a 70% interest in the building. The remaining interest was owned by Broadway National Bank ("Broadway"), a San Antonio bank.

On June 16, 1993, Jackson offered to purchase Broadway's interest in Phase IV for $680,000. Broadway accepted the offer subject to Old Stone's right of first refusal. At the same time, Broadway agreed to provide up to $1.5 million in financing so that Jackson could purchase Old Stone's interest in Phase IV as well. Jackson offered to purchase Old Stone's interest in Phase IV for about $1.5 million.

Meanwhile, Respondent West Telemarketing Corporation ("West Corp.") also expressed an interest in purchasing Phase IV. Respondent West Telemarketing

Corporation Outbound ("West Outbound") was the largest tenant in the Woodway Park office complex and had tried to purchase the property previously. On August 15, 1993, real estate broker Respondent Steve Garza called the RTC on behalf of West Corp. Attempting to negotiate the highest possible sales price for the property, Kathie Christian ("Christian"), the RTC representative handling the bidding process, told Garza that "$2.2 wouldn't be high enough, $2.3 won't be eliminated because of price." The next day West Corp. offered to buy Phase IV for $2.5 million. Christian recommended the offer to the RTC, Broadway, and Jackson (who, as purchaser of Broadway's interest, had to consent to any sale of Old Stone's interest). All parties consented and the sale closed on September 23, 1993.

Jackson and West Outbound made competing bids the next year on Phase I. On July 18, 1994, the RTC wrote to the parties and invited them to submit their "best and final offers." On August 11, 1994, West Outbound offered to purchase Phase I for $2.9 million, while Jackson submitted a bid for $3.1 million. Garza asked Christian "how our offer looked in relation to the others that she might have received." Christian gave him "some range of numbers that the offers fell within." Garza sent a revised offer on behalf of West Outbound for $3.2 million. West Outbound's bid was accepted by the RTC.

Soon after losing out on the Phase I purchase, Jackson began to question the propriety of the bidding process. On January 6, 1995, Jackson sent a formal Freedom of Information Act ("FOIA") request to the RTC for information regarding West Outbound in particular and the bidding process in general. The FOIA request explained

the facts and timelines of both sales transactions, specifically comparing Jackson's bids to West Outbound's, then stated: "I do have a concern as to whether or not my proposal was fairly judged, especially based on the delays incurred." Jackson then made clear that he questioned the process that resulted in West Outbound being the successful bidder: he requested "any other document, *including but not limited to, phone communication log* which may relate to the final decision to select West-Telemarketing as the buyer." Jackson, an attorney, submitted the FOIA request on his law firm's letterhead. The fact that Jackson requested telephone logs of communications between the RTC and West Outbound indicated that he already suspected that there had been some improper contact between the two that resulted in West Outbound being the successful bidder.

The RTC responded to Jackson's FOIA request on February 27, 1995. Because the Phase I sale had not yet closed, the RTC invoked certain exceptions to the FOIA and declined to produce any documents at that time. The response stated, however, that closing on the sale of Phase I between the RTC and West Outbound "is expected no later than March 30, 1995," and after that date information "on all closed sales for the states of Texas, Louisiana and Mississippi is publicly available through the Dallas Field Office Public Service Center."

Jackson appealed the initial FOIA request to the RTC's general counsel by letter dated March 8, 1995, demanding "full and complete information" on the Phase IV property, since that sale had already closed by the date of the appeal. Jackson never contacted the Dallas Field

Office Public Service Center, however, to secure further information regarding either transaction.

On August 12, 1997, more than two years after questioning the propriety of the bidding process to the RTC and more than two years after all of the information involving the Phase I and Phase IV sales became publicly available in the RTC Dallas Field Office, Jackson sued only West Outbound in California state court. Jackson did not sue the other Respondents – West Corp., Garza, or Garza's real estate agency, Providence – at that time. West Outbound removed the action to federal court in California based on diversity of citizenship, then moved to dismiss the case or transfer it to Texas based on lack of personal jurisdiction, improper venue, or in the alternative, convenience of the parties and witnesses. The California federal court did not rule on the personal jurisdiction challenge, but transferred the case to Texas "because of the forum selection clause in the parties' agreement." After the case was transferred to Texas, Jackson added the additional Respondents as defendants.

Respondents moved for a determination that Texas substantive law and limitations periods applied in this diversity case. Respondents argued that Texas choice of law rules applied because Texas was the forum state. Jackson did not dispute that Texas was the forum state and that Texas choice of law rules should apply, but argued that, under Texas choice of law rules, California substantive law – and its limitations period for statutory claims – should apply. Among other factors considered in the choice-of-law analysis is the fact that the parties' agreement included not only a forum selection clause, but also chose Texas law to govern any dispute.

Analyzing Texas choice of law rules, the court held that Texas substantive law applied, then granted summary judgment that Jackson's claims were barred by limitations or failed for lack of evidence as a matter of law. *See* Petitioners' Appendix B at ¶ II (determining that Texas substantive law applies by analyzing Texas choice of law principles).

REASONS FOR DENYING THE WRIT

This Court should deny the petition because the Fifth Circuit correctly recited the applicable law and based its specific holding on the anomalous procedural posture of this case caused by Jackson's failure to raise the choice of law issue in the district courts. The Fifth Circuit correctly recited the general rule that 28 U.S.C. § 1404(a), not state law, governs a federal court's "individualized, case-by-case consideration of convenience and fairness" in enforcing a contractual forum selection clause. Petitioners' Appendix A at 5a, *citing Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988). The Fifth Circuit held that the general rule in *Stewart* did not resolve the precise choice of law issue under the facts of this case, however, because: (1) Jackson never raised the § 1404(a) versus § 1406 issue below so no court had determined whether venue was proper in California to begin with; (2) *Stewart* itself notes that its holding is premised on a determination that the original venue was proper; and (3) the specific record in this case indicated that the transfer to Texas was likely intended to be based on § 1406 rather than § 1404(a) because of improper venue in California.

Where, as here, the original forum was improper, transfer is pursuant to § 1406, not § 1404(a).

As a policy matter, the Fifth Circuit's holding will not encourage forum shopping, but is rather the only means to avoid improper forum shopping. Where a plaintiff chooses a proper forum to begin with, the Fifth Circuit opinion gives deference to that choice. It would be very poor policy indeed to allow a party to file suit in any state at all, no matter how unrelated to the parties or the subject matter of the suit, and then have that state's choice of law principles govern the case forever, wherever transferred.

As an equitable matter, Jackson has not been deprived of valid claims by an improper procedural device. Even if the summary judgment on limitations grounds were reversed, judgment in Respondents' favor was still proper and should be affirmed on substantive grounds.

I. Jackson waived the contention that California should be the forum state.

Jackson's claim before this Court is that the transfer from California to Texas was done pursuant to § 1404(a), so California should remain the forum state, and California choice of law principles should apply. Jackson did not raise that issue before either the California district court or the Texas district court following transfer. *See, Martin v. Stokes*, 623 F.2d 469, 474-475 (6th Cir. 1980) (holding that transferee court should decide whether there was personal jurisdiction in transferor court when deciding which state's choice of law principles to apply). To the

contrary, Jackson neither contested that Texas was the forum state nor disputed that Texas choice of law principles applied.

The first time Jackson ever claimed that California should be considered the forum state and its choice of law principles should apply was in the Brief of Appellants to the Fifth Circuit. As such, the issue is waived. *See Hormel v. Helvering*, 312 U.S. 552, 556 (1941) ("Ordinarily an appellate court does not give consideration to issues not raised below."); *Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Ctrs., Inc.*, 200 F.3d 307, 316-17 (5th Cir. 2000) ("It is a bedrock principle of appellate review that claims raised for the first time on appeal will not be considered."). *See also Reynolds v. American-Amicable Life Ins. Co.*, 591 F.2d 343, 344 (5th Cir. 1979) (finding waiver of choice of law issue where case "was tried on the assumption that Texas law governed and it is only on appeal that appellant argues the applicability of South Carolina law").

As a purely procedural matter, therefore, this Court should deny the petition because the sole issue presented has been waived.

II. Even using California choice of law principles, Texas law and limitations periods would have applied.

Even if California should have remained the forum state and its choice of law principles applied, Texas substantive law would still have been applied to the claims,

and summary judgment would have been proper on limitations grounds. California's longer statutes of limitations would not automatically have applied simply because California's choice of law principles were used. Rather, California's choice of law principles would have been analyzed to determine what state's substantive law should apply, and the limitations period of that state would govern. *Industrial Indem. Co. v. Chapman and Cutler*, 22 F.3d 1346, 1350-1352 (5th Cir. 1994) (California remained the forum after § 1404 transfer to Texas, and California choice of law principles applied to determine what state's limitations period applied).

Even under California choice of law principles, Texas law and its limitations periods would have applied here. First, the parties agreed that Texas law would govern any disputes arising out of the transaction. Second, Texas has a greater interest in having its law applied to this dispute than California does. Among other things, Jackson sought to rescind the sale by the RTC to West Outbound and recover title to the real property at issue, which is located in Texas. In addition to the substantial relation between Texas and the facts of this suit, Texas has a significant interest in having its law applied to suits involving title to real property within the state.

III. The Fifth Circuit did not contradict any other case from any other court.

A. This Court's general rule in *Stewart* is inapplicable where venue is improper to begin with.

This Court has held that, where suit is filed originally in a proper venue, a subsequent transfer pursuant to a

contractual forum selection clause is governed by § 1404(a). *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). *Stewart* did not, however, even imply that § 1404(a) controls when the original venue was improper. To the contrary, *Stewart* expressly distinguished such a situation, which would be governed by § 1406.

The precise issue presented in *Stewart* was whether federal courts sitting in diversity should enforce forum selection clauses based on state law or federal law, and if under federal law, what should be the standard. The Court held that federal law, not state law, should govern the inquiry, but disagreed with the Eleventh Circuit as to which federal law should apply. The Eleventh Circuit had held that the district court should analyze the forum selection clause according to the standards set out in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (holding that federal courts sitting in admiralty generally should enforce forum selection clauses absent a showing that to do so "would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.").

This Court held, instead, that the federal courts should analyze forum selection clauses pursuant to § 1404(a), which allows the court to weigh the transfer decision "according to an individualized, case-by-case consideration of convenience and fairness." *Stewart*, 487 U.S. at 29. The *Stewart* Court noted that the "flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties' private expression of their venue preferences." *Id.* at 29-30.

The *Stewart* Court made it clear, however, that venue was proper to begin with, and thus § 1406 did not control: "The parties do not dispute that the District Court properly denied the motion to dismiss the case for improper venue under 28 U.S.C. § 1406(a)." *Stewart*, 487 U.S. at 29 n. 8. Thus, *Stewart* did not hold, as Jackson implies, that any transfer of venue whenever a forum selection clause exists is necessarily a § 1404(a) transfer. The holding in *Stewart* thus controls only when venue was proper to begin with, but the district court determines that various factors, including the parties' contractual selection of a different forum, weigh in favor of a transfer to some other proper venue.

B. Transfers from an improper venue are properly governed by § 1406.

This Court has previously held that, when venue is transferred pursuant to § 1404(a), the state in which the transferor court sits remains the "forum," and the transferee court will apply the choice of law principles of that state. *Van Dusen v. Barrack*, 376 U.S. 612, 636 (1964) (transfer in diversity case requested by defendant); *Ferens v. John Deere Co.*, 494 U.S. 514, 529-530 (1990) (transfer in diversity case requested by plaintiff). This Court has never held, however, that when a transfer is made pursuant to § 1406 because venue is improper, the transferor court remains the forum. That has never been the law.

The Fifth Circuit and many other circuits agree that the transferee state becomes the forum if the original venue selected by the plaintiff was improper. "Following a section 1406(a) transfer, regardless of which party

requested the transfer or the purpose behind the transfer, the transferee court must apply the choice of law rules of the state in which it sits." *Tel-Phonic Services, Inc. v. TBS Intern., Inc.*, 975 F.2d 1134, 1141 (5th Cir. 1992), *citing Ellis v. Great Southwestern Corp.*, 646 F.2d 1099, 1110 (5th Cir. Unit A June 1981). *See also Trierweiler v. Croxton and Trench Holding Corp.*, 90 F.3d 1523, 1532 (10th Cir. 1996); *Adam v. J.B. Hunt Transport, Inc.*, 130 F.3d 219, 229 (6th Cir. 1997); *Wisland v. Admiral Beverage Corp.*, 119 F.3d 733, 735 (8th Cir. 1997), *cert. denied*, 522 U.S. 1112 (1998); 15 Charles A. Wright, et al., FEDERAL PRACTICE AND PROCEDURE § 3827 (1986) ("[W]henever the original venue is improper . . . the transferee court should apply whatever law it would have applied had the action been properly commenced there.").

This rule makes sense. The Eighth Circuit explained that applying the law of the transferee state to § 1406 transfers from improper venues is the only way to avoid forum shopping: "If the law of the transferor court were applied, a plaintiff could deliberately file in a jurisdiction with favorable law but clearly improper venue and benefit from its choice." *Wisland*, 119 F.3d at 735. Such a rule is also consistent with *Stewart*, which expressly noted that venue was proper where suit was originally filed. *Stewart*, 487 U.S. at 29 n. 8.

The general rule does not change simply because there is a forum selection clause involved. Venue in the original court is proper or not based on the applicable venue statute. Any forum selection clause would only become relevant upon the district court's analysis of whether or not to transfer a case, and if so where to send it. For example, if venue were proper to begin with, then

a district court could weigh a forum selection clause and other considerations to decide whether to transfer a case "in the interest of fairness" under § 1404(a). That was the scenario in *Stewart*. In that instance, the transferor court would remain the forum, and its choice of law principles would apply. If, however, venue was not proper where the plaintiff originally filed suit, a district court pursuant to § 1406 could dismiss the case or transfer it to the forum selected by the parties. *See Tel-Phonic*, 975 F.2d at 1141 n. 7 (explaining that venue was "improper" in the transferring court under applicable venue statute, and particular transferee court was selected "because of a forum selection clause").

Thus, a transfer involving a forum selection clause is neither *ipso facto* a § 1404(a) transfer nor a § 1406 transfer. Whether it is governed by § 1404(a) or § 1406 depends on whether venue was proper to begin with. If venue is improper in the original forum, then such a transfer is governed under § 1406, and choice of law principles from the transferee court apply. As will be discussed more fully below, venue was improper in this case because West Outbound was not subject to personal jurisdiction in California.

C. The Fifth Circuit opinion does not conflict with *Stewart*.

The Fifth Circuit opinion is entirely consistent with *Stewart* and the general rules, discussed above, regarding transfers of venue. The court first correctly recited the general rule from *Stewart* that § 1404(a) "is intended to place discretion in the district court to adjudicate motions

for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.' " Petitioners' Appendix A at 5a. The court then determined that *Stewart* did not answer the precise issue presented, for three case-specific reasons.

First, the Fifth Circuit discussed the procedural history and noted that Jackson did not raise the issue in the district court, and never disputed that Texas choice of law rules applied. If Jackson had raised the issue before the district court, that court could have clarified the grounds for the transfer, and confirmed whether the transfer was made pursuant to § 1404(a) or § 1406. Appendix A at 5a.

Then, the Fifth Circuit correctly noted that *Stewart* did not hold, as Jackson implies, that any transfer where there is a forum selection clause is *ipso facto* a transfer under § 1404(a): "*Stewart* does not mandate that whenever a forum selection clause exists any transfer must fall under § 1404(a)." Appendix A at 6a. The court thus correctly recognizes that *Stewart* is limited to cases where venue was proper to begin with.

Finally, the Fifth Circuit discussed the specific facts and arguments made by each side in this specific record, noting that "the record provides valuable insight into the statutory basis for the transfer." The court concluded that "the [district] court obviously accepted West's contentions that venue in California was improper" and noted correctly that a "transfer for improper venue comes under § 1406(a)." Appendix A at 6a.

Thus, the Fifth Circuit opinion is consistent with *Stewart*, but simply concluded that, in this case, *Stewart* did not answer the question. Because this case involved a

situation where venue was alleged to be improper, the court properly recognized that the inquiry involved a different analysis. The Fifth Circuit did not hold, as Jackson claims, that the forum selection clause, by itself, rendered venue improper in California. It did not decline to follow *Stewart* or announce a split with other circuits involving the proper analysis of the *Stewart* rule. The Fifth Circuit discussed the particular facts of the case, concluded that the district court likely agreed that venue was improper in California, and made the transfer pursuant to § 1406.

The Fifth Circuit also properly relied upon its previous decision in *Tel-Phonic*, 975 F.2d 1134, which held that a transfer from an improper venue is accomplished under § 1406, not § 1404(a). The *Tel-Phonic* court did not, as Jackson claims, base its decision that venue was improper on the existence of a forum selection clause. Rather, the court there made clear that the transfer was pursuant to § 1406 because venue was improper substantively: the sole basis for venue where suit was filed – a venue provision in the RICO statute – was inapplicable because the RICO claim was dismissed. *Tel-Phonic*, 975 F.2d at 1141 n. 7. The court then selected the transferee court based on the forum selection clause. *Id.* The *Tel-Phonic* court expressly distinguished its holding from a situation where venue is proper originally, but is transferred pursuant to § 1404(a) according to a forum selection clause. *Id.* Jackson thus misrepresents the express analysis of *Tel-Phonic* when claiming that the court there "held that a forum selection clause renders other venues improper for purposes of section 1406." Petition at 11.

D. There is no conflict between the Fifth Circuit opinion and any other case.

Jackson argues that the Fifth Circuit opinion conflicts with *Stewart* and opinions from other circuits. The cases discussed, however, are consistent with the general rules set out above: (1) where venue is proper to begin with, transfer pursuant to a forum selection clause is governed by § 1404(a); (2) where venue is transferred under § 1404(a), the transferor court remains the forum; (3) where venue is transferred under § 1406, the transferee court becomes the forum; and (4) existence of a forum selection clause does not make a transfer *ipso facto* either a § 1404(a) transfer or a § 1406 transfer.

For example, the court in *Blue Ash Development, Inc. v. Polan*, 74 F.3d 1240, 1996 WL 1828 (6th Cir. 1996), noted that § 1406 provides for transfer or dismissal "when a case is brought where venue is initially 'wrong,' " and explained that *Stewart* "suggests that § 1406(a) applies mainly to situations when the action is initially brought in a division or district where the *statutory* requirements for venue (28 U.S.C. § 1391) have not been met." (court's emphasis). 1996 WL 1828 at *1 n. 1. The *Blue Ash* court thus agreed with the Fifth Circuit's conclusion that § 1406 governs when suit is originally filed in an improper forum.

Similarly, the court in *Jumara v. State Farm Ins. Co.*, 55 F.3d 873 (3rd Cir. 1995), described the general rule consistent with the Fifth Circuit opinion below:

> Section 1404(a) provides for the transfer of a case where both the original and the requested venue are proper. Section 1406, on the other

> hand, applies where the original venue is improper and provides for either transfer or dismissal of the case.

Jumara, 55 F.3d at 878. The court then correctly noted that in "order to decide which statute should have governed the district court's transfer order in this case, therefore, we must first determine whether venue was proper" where suit was originally filed. *Id.* As in *Blue Ash*, that statement of the general law in *Jumara* recognizes that § 1406 governs venue transfers when venue is improper to begin with and is thus entirely consistent with the Fifth Circuit opinion. There is no conflict here.

IV. California was not a proper forum because there was no personal jurisdiction over West Outbound in California.

A. Personal jurisdiction is the operative standard for determining whether California was a proper forum as to West Outbound.

As is discussed above, a transfer of venue from one federal court to another is accomplished pursuant to § 1406, and the choice of law principles of the transferee state apply, if the original venue was improper. Under 28 U.S.C. § 1391(a), venue is proper where any defendant resides (§ 1391(a)(1)), or where "a substantial part of the events or omissions giving rise to the claim occurred" (§ 1391(a)(2)). If venue is based on § 1391(a)(2), the law of the transferee state applies if there was no personal jurisdiction over the defendant in the transferor state, even if venue was proper. Stated another way, if venue is proper but personal jurisdiction is lacking where suit is originally filed, the choice of law principles of the transferee

state apply. *See*, Charles A. Wright, FEDERAL PRACTICE AND PROCEDURE, § 3827. Thus, only if West Outbound was subject to personal jurisdiction in California could California remain the forum state after transfer to Texas.

B. West Outbound has very limited contacts with California.

As a starting point, it is important to emphasize that the California district court never expressly ruled on West Outbound's personal jurisdiction challenge. The court in California transferred the case to federal court in Dallas, the forum selected by the parties in their forum selection clause, but made no ruling regarding personal jurisdiction. Jackson claims that the court must have overruled the personal jurisdiction challenge, because it declined the only relief sought regarding personal jurisdiction: dismissal. Petition at 13. The court's action, however, is just as consistent with a determination that there was no personal jurisdiction, and a decision to transfer the case to Dallas rather than dismiss it. Indeed, Jackson argued that such a decision to transfer under § 1406 to a proper venue rather than dismiss a case where there is no personal jurisdiction reflects sound public policy. Petition at 16-17, *discussing Goldlawr, Inc. v. Heiman*, 369 U.S. 463 (1962) (permitting transfer to proper venue when personal jurisdiction lacking).

Though there is no express ruling below regarding personal jurisdiction, the record indicates very strongly that the California court lacked either general or specific personal jurisdiction over West Outbound, and California

was thus an improper forum. Regarding West Outbound's general contacts with California, the record shows that West Outbound has never owned nor leased property in California; has never had an office in California; has never had employees, officers, or directors in California; has never had local telephone listings in California; has never had a mail box or mailing address in California; has never collected sales tax in California nor paid any taxes there; has never advertised in any indigenous media in California; has never been qualified to do business in California and has never had a registered agent for service there. Though West Outbound did make telemarketing calls to California residents during the relevant time period, its invoices to California residents totaled just 0.005% of its revenue in 1993, 0.56% of its revenue in 1994, and 0.37% of its revenue for 1995.

Regarding specific jurisdiction, the record established that the claims against West Outbound did not arise out of its telemarketing contacts. The only contacts by West Outbound to California relating to the subject matter of this suit were: (1) a single letter from Garza in Texas to Jackson in California informing him that West Outbound sought to purchase Phase IV and therefore rejecting Jackson's offer that West Outbound settle for being a tenant instead; (2) two telephone calls between Jackson in California and Garza in Texas relating to Phase IV, at least one of which was initiated by Jackson. There was no communication between Jackson and Garza at all regarding Phase I. The actual record thus belies the contention that Garza "repeatedly communicated with Jackson via phone and letter." Petition at 13.

C. There was no general jurisdiction over West Outbound in California.

The question presented is whether West Outbound is subject to personal jurisdiction in California. The appropriate court to answer that question would have been the federal district court in California. Thus, the law of the Ninth Circuit interpreting the California long-arm statute is instructive.

1. West Outbound's contacts with California are not substantial.

The Ninth Circuit has explained that only if a non-resident's activities within a state are "substantial" or "continuous and systematic," is there "a sufficient relationship between the defendant and the state to support jurisdiction even if the cause of action is unrelated to the defendant's forum activities." *Scott v. Breeland*, 792 S.W.2d 925, 927 (9th Cir. 1986); *Data Disc, Inc. v. Systems Technology Assoc.*, 557 F.2d 1280, 1285 (9th Cir. 1977). The plaintiff bears the burden of establishing that jurisdiction exists. *Id.*

The Ninth Circuit has previously held that contacts akin to West Outbound's are not sufficiently "substantial" or "continuous and systematic" to support personal jurisdiction. For example, in one case the court held that a non-resident defendant's use of a sales agent in California to solicit sales orders, order samples, recommend additional sales agents, promote products and attend trade shows, and promote sales of the defendant's products through the mail and a showroom display were

insufficient contacts to establish general personal jurisdiction. *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1241-42 (9th Cir. 1984). The Ninth Circuit further rejected the exercise of personal jurisdiction over a cruise line where its contacts with the forum state were "limited to advertising in the local media, the mailing of brochures and the payment of commissions to travel agents, the conducting of promotional seminars, and the sale of its vacation cruises to residents of Washington. Only 1.29% and 1.06% of Carnival's cruise business was derived from residents of Washington in 1985 and 1986, respectively." *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 381 (9th Cir. 1988), *rev'd on other grounds*, 499 U.S. 588 (1991). The Ninth Circuit also rejected exercise of general jurisdiction over the music group, The Oak Ridge Boys, who gave periodic concerts in California and regularly distributed their music through California record stores. *Scott*, 792 F.2d at 927.

2. It would not be reasonable to subject West Outbound to jurisdiction in California.

Independent of sufficient contacts with California, exercise of personal jurisdiction comports with due process only if it is reasonable and comports with fair play and substantial justice. The Ninth Circuit has articulated seven factors to weigh in determining such reasonableness:

> (1) the extent of the defendants' purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of the conflict with the sovereignty of the defendants' state; (4) the

> forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

Core-Vent Corp. v. Nobel Industries AB, 11 F.3d 1482, 1487-1488 (9th Cir. 1993). Analysis of the factors weighs against maintaining jurisdiction over West Outbound in California.

The first factor weighs significantly in West Outbound's favor, given its very limited contacts with California: "the smaller the element of purposeful interjection, the less is jurisdiction to be anticipated and the less reasonable is its exercise." *Core-Vent*, 11 F.3d at 1488; *Ins. Co. of North America v. Marina Salina Cruz*, 649 F.2d 1266, 1271 (9th Cir. 1981). *See also Corporate Invest. Brokers v. Melcher*, 824 F.2d 786, 787 (9th Cir. 1987) (explaining that even if "there is sufficient 'interjection' into the state to satisfy the [purposeful availment prong], the degree of interjection is a factor to be weighed in assessing the overall reasonableness of jurisdiction under the [reasonableness prong]").

The second and sixth factors weigh the relative burdens on plaintiff and defendant, and the Ninth Circuit has made clear that the interests and convenience of the defendant are of "primary concern." *Pacific Atlantic Trading Co. v. M/V Main Exp.*, 758 F.2d 1325 (9th Cir. 1985); *FDIC v. British-American Ins. Co.*, 828 F.2d 1439, 1444 (9th Cir. 1987) (explaining that "the primary concern is for the defendant's burden"). Thus, those factors in the main favor West Outbound.

The third factor – the extent of conflict with the sovereignty of the defendant's state – weighs in West Outbound's favor. To the extent there is any conflict between the laws of Texas and California, the parties have contractually already chosen Texas law.

The fourth factor, the interest of the forum, favors Jackson in that California has an interest in adjudicating the claims of its residents. The fifth factor, the most efficient forum, favors West Outbound. Most of the witnesses and documents are in Texas, not California, and the real property at issue is in Texas. The seventh factor, the availability of another forum, weighs in West Outbound's favor. Not only does Jackson bear "the burden of proving the unavailability of an alternative forum," *Roth Garcia Marquez*, 942 F.2d 617, 624 (9th Cir. 1991), but the parties actually contracted to select another forum: Dallas, Texas.

It is clear, then, that the Ninth Circuit interprets the California long-arm statute and the limits of due process as requiring substantial contact with the forum state: something more than five one-hundredths of a percent of a non-resident defendant's business. Viewed against that standard, which Jackson does not even attempt to discuss, West Outbound's contacts with California are not sufficient to establish general personal jurisdiction.

D. There is no specific jurisdiction over West Outbound in California.

The Ninth Circuit has articulated a three-part test to determine whether there is specific jurisdiction over a non-resident defendant:

> (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or results from the defendant's forum-related activities; and (3) exercise of jurisdiction must be reasonable.

Omeluk v. Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 269 (9th Cir. 1995). *See also Garcia Marquez*, 942 F.2d at 620-621 (9th Cir. 1991).

The "purposeful availment" test is not a facile one. "In order to have purposefully availed oneself of conducting activities in the forum, the defendant must have performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state." *Garcia Marquez*, 942 F.2d at 621, *quoting Sinatra v. National Enquirer*, 854 F.2d 1191, 1195 (9th Cir. 1988). "This purposeful availment requirement ensures that the defendant is not haled into a jurisdiction as a result of random, fortuitous or attenuated contacts, or on account of unilateral activity of another party or third person." *Garcia Marquez*, 942 F.2d at 621, *quoting Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985).

West Outbound's only contacts with California relating to the claims here were two telephone conversations and a letter, mostly initiated by Jackson. At least one telephone call was initiated unilaterally by Jackson to Garza in Texas, calling to suggest that West Outbound not compete with Jackson to purchase Phase IV but rather

allow Jackson to purchase the property and be a tenant only. The letter was West Outbound's response rejecting Jackson's suggestion. West Outbound's core activities relating to the transaction at issue consisted of negotiations with an RTC representative in Rhode Island and a banker in Texas to purchase real property in Texas. West Outbound's contacts with California were thus attenuated and based primarily on the unilateral activity of Jackson, and do not meet the standard of "purposeful availment."

The reasonableness of specific jurisdiction is measured by the same test as for general jurisdiction. *See Garcia Marquez*, 942 F.2d at 623. As is discussed more fully above, analysis of those factors weighs against it being reasonable to subject West Outbound to jurisdiction in California.

V. California cannot be the forum state as to the later-added Respondents, who are not subject to personal jurisdiction in California.

As stated above, Jackson added West Corp., Garza, and Providence as defendants after the case was transferred to Texas. It is beyond cavil that California lacked personal jurisdiction over the remaining defendants: West Corp., Garza, and Providence. None make telemarketing calls to California residents (the basis Jackson claims for general jurisdiction over West Outbound), and their specific contacts with California are minimal. Further, particularly as to Garza and his local San Antonio real estate business Providence, it would be unreasonable to subject them to jurisdiction in California. Thus, even if

jurisdiction had been proper in California as to West Outbound, it is not proper as to the later-added defendants, and California could not remain the forum state as to them.

If a case is transferred from a court where there is no personal jurisdiction over a defendant, the law of the transferee state applies:

> Thus whenever the original venue is improper, so that transfer is under § 1406(a), the transferee court should apply whatever law it would have applied had the action been properly commenced there. But although a change of venue under § 1404(a) is ordinarily only a change of courtrooms and not a change of law, so that after transfer the same law is applied as would have been applied in the transferor court, the result must be otherwise if the action was commenced in a district where venue was proper but personal jurisdiction cannot be obtained. *Plaintiff can have the benefit of the rules of law that would have been applied in the forum where he originally brought suit only if that forum was a proper one in terms both of venue and jurisdiction.* The transferee court must apply its own law whether a transfer from a court where personal jurisdiction was lacking purports to rest on § 1406(a) or § 1404(a).

Charles A. Wright, FEDERAL PRACTICE AND PROCEDURE, § 3827 (emphasis added). Because there would not have been personal jurisdiction over the later-added Respondents in California, California cannot be the forum state as to them.

It is immaterial that West Corp., Garza, and Providence were added as defendants in Texas and were not actually forced to litigate physically in California. As Jackson claims, if California is treated as the forum state after the transfer, then there is "but a change of courtrooms," and all Respondents are subjected to California law. Essentially, then, the later-added Respondents are haled into California court even though there would be no personal jurisdiction over them in California. Such a result would violate their due process rights. *See International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (due process demands that defendant not be subject to suit in a state absent meeting standard for personal jurisdiction).

VI. Summary judgment would have been proper on Jackson's claims on the merits.

The district court granted summary judgment on limitations as to some of Jackson's claims, and on substantive grounds as to the remaining claims. In addition to affirming the limitations summary judgment, the Fifth Circuit affirmed the summary judgment on substantive grounds as to Jackson's fraud claim. Appendix A at 10a. Respondents had moved for summary judgment on substantive grounds as to all claims, however, so judgment against Jackson was proper even if limitations was not a proper grounds for judgment.

A quick survey of some of Jackson's claims illustrates that summary judgment against them was inevitable on substantive grounds. For example, any claim under the Texas Deceptive Trade Practices Act would fail because

the statute exempts transactions that involve consideration over $500,000. TEX. BUS. & COM. CODE ANN. § 17.49(g) (West Supp. 1999). Jackson's claim for conversion fails because, under Texas law, one cannot convert intangible rights, such as Jackson's claimed "trade secrets" in the bids to the RTC. *W. G. Pettigrew Distributing Co. v. Borden, Inc.*, 976 F. Supp. 1043, 1057 (S.D.Tex. 1996), *aff'd*, 127 F.3d 34 (5th Cir. 1997). The claim for tortious interference fails because Respondents were privileged to compete for the business of purchasing the properties. *See, e.g., Barker v. Brown*, 772 S.W.2d 507, 511-12 (Tex. App. – Beaumont 1989, no writ). Any claim for breach of fiduciary duty or breach of a duty of good faith and fair dealing fails based on the Fifth Circuit's ruling that Respondents did not owe Jackson such a duty. Appendix A at 10a-11a. The claim for misappropriation of trade secrets fails because Respondents did not breach any confidence or duty by learning of the information. *See Sheets v. Yamaha Motors Corp., U.S.A.*, 849 F.2d 179, 183 (5th Cir. 1988) (asserting that disclosure of trade secret to one who has no obligation of confidentiality extinguishes property right in trade secret); *Phillips v. Frey*, 20 F.3d 623, 627 (5th Cir. 1994).

Thus, any relief this Court might give Jackson from the statute of limitations would be illusory, as the Fifth Circuit on remand would affirm the summary judgment against Jackson on substantive grounds.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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